UC Irvine Law Review

Volume 9 | Issue 3 Article 3

3-2019

The Case for Plagiarism

Andrew M. Carter

The Case for Plagiarism

Andrew M. Carter*

INTRODUCTION

It is hard to argue that Peter Cannon was done wrong. In 2006, while researching a brief in a bankruptcy matter, Cannon, a Des Moines, Iowa attorney, discovered an article on a New York law firm's website.[1] The article was composed by two of the firm's bankruptcy lawyers, and it was apparently quite on point.[2] Cannon's opening brief was nineteen pages long; he composed seventeen of those pages by cutting and pasting whole paragraphs from the online article.[3] He did not, however, see fit to cite the article from which he extensively copied.[4]

---

*Clinical Professor of Law, Sandra Day O'Connor College of Law, Arizona State University. I thank professors Alyssa Dragnich, Kim Holst, Sue Chesler, Jason Cohen, Tamara Herrera, and John Kappes for taking the time to review early drafts of this article. Their guidance was invaluable, and this Article is surely better for their efforts.

1. *See generally In re* Burghoff, 374 B.R. 681 (Bankr. N.D. Iowa 2007). Cannon's client was not a debtor or creditor in the bankruptcy proceeding; rather, Cannon's client was made a party defendant because the bankruptcy trustee suspected the client of fraudulently receiving pre-petition transfers from the debtor. *Id.* at 683. The trustee retained two attorneys to investigate the alleged fraudulent transfer; Cannon's motion was intended to remove these counsel on asserted conflict of interest grounds. *Id.* The online article he copied from was titled *Why Professionals Must Be Interested in 'Disinterestedness' Under the Bankruptcy Code*; it was written by William Schram and Marc Haut, two attorneys with the firm of Morgan, Lewis and Bockius LLP. *See id.*
2. *See id.*
3. *See id.*
4. *See id.*

If a plagiarist is someone who copies the written work of another without giving attribution to the original author,[5] then Peter Cannon is certainly a plagiarist. But as plagiarists go, it seems he wasn't terrible at the craft. Before drafting (i.e., copying) his brief, he obtained a command of the case record.[6] He conducted research beyond the copied article.[7] And, to better support his client's argument, he made necessary editorial changes to his copied materials by deleting or altering certain passages.[8] On the other hand, it is probably true that the key to being a truly skilled plagiarist is to escape detection. And Cannon did not escape detection. His brief was *too* good. The Bankruptcy Court became suspicious of the brief's "unusually high quality"[9] and ordered Cannon to certify the brief's authors.[10] The gig was up; Cannon came clean.[11]

The judicial swords fell heavy. In a written opinion submitted for publication, the bankruptcy court described Cannon's plagiarism as "a fundamental professional deficiency"[12] and humiliated him with an order that he enroll in a law school ethics class.[13] After a formal ethics investigation, the Iowa Supreme Court, again in a published opinion, ordered a public reprimand.[14] To add insult to injury, the case garnered national attention. After the Bankruptcy Court's published decision was issued, Peter Cannon was deemed "Lawyer for the Day" on the website Above the Law. The editors tagged the article under "attorney misconduct" and "rank stupidity."[15]

---

5. This is a standard dictionary definition of plagiarism, which I will rely upon throughout. *See Plagiarize*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/plagiarizing [https://perma.cc/8T8J-MBSZ] (last visited January 25, 2019). This definition of plagiarism tracks that offered by the Modern Language Association: "Plagiarism is presenting another person's ideas, information, expressions, or entire work as one's own." *See Plagiarism and Academic Dishonesty*, THE MLA STYLE CENTER, https://style.mla.org/plagiarism-and-academic-dishonesty [https://perma.cc/845W-DDYB] (last visited January 25, 2019). Moving beyond these standard definitions can be treacherous. *See* RICHARD A. POSNER, THE LITTLE BOOK OF PLAGIARISM 11 (2007) (observing that plagiarism "turns out to be difficult to define"); Brian Frye, *Plagiarism Is Not a Crime*, 54 DUQ. L. REV. 133, 141-42 (2016) ("The meaning of the term 'plagiarism' is indeterminate in part because it depends on social context. Different social groups define plagiarism differently by adopting various plagiarism norms.").

6. Cannon claimed to have reviewed thirty-two banker boxes of documents in preparation for drafting the brief. *See* Iowa Supreme Court Att'y Disciplinary Bd. v. Cannon, 789 N.W.2d 756, 758 (Iowa 2010).

7. *See id.*

8. *See Burghoff*, 374 B.R. at 683–84.

9. *Cannon*, 789 N.W.2d at 757.

10. *Burghoff*, 374 B.R. at 683.

11. Cannon acknowledged that he had "relied heavily" on the article he found online. *Id.* He also self-reported himself to the Iowa Bar for discipline. *See Cannon*, 789 N.W.2d at 758.

12. *Burghoff*, 374 B.R. at 687.

13. *Id.* The Bankruptcy court explained that "a continuing education class will not cure his ethical shortcomings. Mr. Cannon's deficiency calls for the more-involved method of instruction offered in a law school course on professional responsibility." *Id.*

14. *Cannon*, 789 N.W.2d at 760.

15. *See* David Lat, *Lawyer of the Day: Peter Cannon*, ABOVE THE LAW (Sept. 10, 2007, 2:30 PM), https://abovethelaw.com/2007/09/lawyer-of-the-day-peter-cannon [https://perma.cc/A62M-VHEX].

Fair enough. But why, exactly, would a court care about a failure of attribution in a brief, especially when the end product is of high quality? In its formal ethics opinion, the Iowa Supreme Court explained only that "misrepresentation" qualified as attorney misconduct under Iowa's Rule of Professional Conduct 8.4(c) and that Cannon's plagiarism was misrepresentation "plain and simple."[16] But that reasoning begs the question. It explains that Peter Cannon's plagiarism warranted a sanction because he misrepresented he was the true author of the brief. In other words, his plagiarism warranted a sanction because, well, it was plagiarism.

There is persistent body of case law in which courts publicly rebuke attorneys for plagiarism in a submitted brief.[17] This case law suggests a robust rule against plagiarism in written advocacy. Courts variously label the practice as "unprofessional,"[18] "obnoxious,"[19] "dishonest,"[20] "reprehensible,"[21] "wholly intolerable,"[22] and "completely unacceptable."[23] But like the Iowa Court in *Cannon*, these courts never explain why, exactly, plagiarism is worthy of sanction.

16. *Cannon*, 789 N.W.2d at 759. *See also* IOWA RULES OF PROF'L CONDUCT r. 32:8.4(c) (2015) (defining "dishonesty, fraud, deceit or misrepresentation" as attorney misconduct).

17. What follows is a catalog of published cases. Presumably, many more courts have admonished attorneys for plagiarism in a filed brief by means more informal than a published "bench slap." *See* Wayne Schiess, *Ethical Legal Writing*, 21 REV. LITIG. 527, 527 (2002) ("Many more lawyers have gotten into trouble for their writing, although they were fortunate enough not have their cases published."); Venesevich v. Leonard, 378 F. App'x. 129 (3d Cir. 2010) (admonishing attorney for plagiarizing earlier court order); United States v. Bowen, 194 F. App'x 393, 402 n.3 (6th Cir. 2006) (admonishing attorney for plagiarizing case law and issuing warning "to all attorneys tempted to 'cut and paste' *helpful* analysis into their briefs") (emphasis added); United States v. Jackson, 64 F.3d 1213, 1219 n.2 (8th Cir. 1995) (expressing "disapproval of a style of brief-writing that appropriates both arguments and language without acknowledging their source"); Rossello v. Avon Prods., Inc., No. 14-1815(JAG), 2015 WL 5693018, at *2 n.4 (D.P.R. Sept. 28, 2015) (labeling counsel's plagiarism as "dishonest, unprofessional, and potentially sanctionable"); Pick v. City of Remsen, 298 F.R.D. 408, 412 n.1 (N.D. Iowa 2014) (calling counsel's plagiarism of earlier opinion of court "lazy, obnoxious, and unprofessional"); A.L. v. Chi. Pub. Sch. Dist. #299, No. 10 C 494, 2012 WL 3028337, at *6–67 (N.D. Ill. July 24, 2012) (admonishing counsel and cutting fee reward on grounds of counsel "cutting and pasting" from case law without attribution); State Farm Fire & Cas. Co. v. Harris, No. 3:11-36-DCR., 2012 WL 896253, at *1 n.3 (E.D. Ky. Mar. 15, 2012) (admonishing counsel for plagiarizing from case law, calling the practice "completely unacceptable"); United States v. Sypher, No. 3:09-CR-00085, 2011 WL 579156, at *3 n.4 (W.D. Ky. Feb. 9, 2011) (admonishing counsel for plagiarizing from Wikipedia); Schultz v. Wilson, No. 1:04-CV-1823, 2007 WL 4276696, at *6 n.13 (M.D. Pa. Dec. 4, 2007) (admonishing counsel for plagiarizing case law and explaining that "such conduct often 'ill-represents the client's interests'"); Vasquez v. City of Jersey City, No. 03-CV-5369 (JLL), 2006 WL 1098171, at *8 n.4 (D.N.J. Mar. 31, 2006) (expressing "displeasure" with counsel for plagiarizing from case); Kingvision Pay Per View, Ltd. v. Wilson, 83 F. Supp. 2d 914, 916 n.4 (W.D. Tenn. 2000) (labelling counsel's plagiarizing of secondary source "distasteful" and likely misconduct under Tennessee Code of Professional Conduct); Premier Ins. Co. v. Commonwealth Dep't of Labor, No. 2011-SCC-0032-CIV, 2012 WL 6589404, at *4 n.7 (N. Mar. I. Dec. 18, 2012) (calling attorney's plagiarism of trial court order "unacceptable conduct" below the "highest standards of integrity and professionalism").

18. *Vasquez*, 2006 WL 1098171, at *8 n.4.

19. *Pick*, 298 F.R.D. at 412 n.1.

20. *Rossello*, 2015 WL 5693018, at *2 n.4.

21. Pagan Velez v. Laboy Alvarado, 145 F. Supp. 2d 146, 160–61 (D.P.R. 2001).

22. Dewilde v. Guy Gannett Publ'g Co., 797 F. Supp. 55, 56 n.1 (D. Me. 1992).

23. United States v. Bowen, 194 F. App'x 393, 402 n.3 (6th Cir. 2006).

Rather, the courts proceed as though plagiarism is a *malum se* offense, a practice of such obvious moral turpitude that its prohibition requires no further explanation.

Does plagiarism before the courts have a moral dimension? Your answer to that question may turn on how much time you have spent studying and working in an academic setting. One thing that all judges have in common is that they spent many years training in academic institutions, typically four years of college and another three years of law school. The academy, of course, has a strict rule against plagiarism in all written work product. As a scholar, to be labeled a plagiarizer is the "academic equivalent of the mark of Cain."[24] As a student, plagiarism is a cardinal offense, punishable by expulsion under even the barest student honor codes. In the classes I teach in law school, I instruct my students that plagiarism is professional doom: even if a plagiarist is not expelled from law school under the honor code,[25] bar examiners may still find her unfit to practice.[26] Surely, if you spend enough time in an institution where plagiarism is likened to a biblical mark of shame, a rule against plagiarism will begin to feel like a moral imperative.[27]

To be sure, the heavy rule against plagiarism that prevails in the academy makes good sense. But that's not because plagiarism is a universal evil. The academic norm prevails because originality has a unique value in the academic setting, and these values are well served by a professional rule against plagiarism.[28] There is a modest amount of scholarship examining broad plagiarism norms. A fundamental precept in all this scholarship is that rules against plagiarism do not rest on some universal philosophical notion; rather, all plagiarism norms are context-specific.[29]

---

24. K.R. ST. ONGE, THE MELANCHOLY ANATOMY OF PLAGIARISM 61 (1988); *see also* POSNER, *supra* note 5, at 107 (observing that plagiarism in the academy is a "capital intellectual crime").

25. For cases where plagiarism by a law student resulted in expulsion, see Beauchene v. Mississippi College, 986 F. Supp. 2d 755 (S.D. Miss. 2013); Yu v. University of La Verne, 126 Cal. Rptr. 3d 763, 766 (Ct. App. 2011); *In re* Lamberis, 443 N.E.2d 549, 552-53 (Ill. 1982). For a discussion of these and other plagiarism cases involving students in law schools, see Decarlous Y. Spearman, *Citing Sources or Mitigating Plagiarism: Teaching Law Students the Proper Use of Authority Attribution in the Digital Age*, 42 INT'L J. LEGAL INFO. 177, 182-83 (2014). For an interesting case of law student plagiarism that did not result in expulsion, consider the case of former Vice President Joseph Biden. In 1965, while a student at Syracuse Law School, Biden submitted a fifteen page paper for credit that copied, without attribution, five pages from a law review article. *See* E.J. Dione, Jr., *Biden Admits Plagiarism in School but Says It Was Not "Malevolent,"* N.Y. TIMES, Sept. 18, 1987, at A1. Biden received a failing grade in the class and the offense was documented in his law school record, but he was not expelled. *See generally id.*

26. For cases where bar applicants were denied admission because of an act of plagiarism in law school, see *In re* White, 656 S.E.2d 527,528 (Ga. 2008); *In re* K.S.L., 495 S.E.2d 276, 277-78 (Ga. 1998); *In re* Zbiegen, 433 N.W.2d 871 (Minn. 1988); *In re* Widdison, 539 N.W.2d 671 (S.D. 1995).

27. *See* Stuart Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 175 (2002) ("For most people within the relevant community, the attribution norm becomes internalized. Such people view attribution as being, or closely akin to being, a moral obligation . . . .").

28. *See infra* notes 50–52 and accompanying text.

29. ST. ONGE, *supra* note 24, at 62 ("The essence of the [plagiarism] complaint of unfair usage and deficient acknowledgement resides in the contextuals in which the offense or alleged offense occurs."); Frye, *supra* note 5, at 147 ("The scope of the attribution right depends on the social group that creates and enforces the plagiarism norm."); Green, *supra* note 27, at 196–97 (observing "a good

They are conceived and enforced to serve the discrete needs of the institution in which a potential plagiarist operates.[30]

Once plagiarism is properly viewed as "a breach of disciplinary decorum, not a breach of the moral universe,"[31] one must be wary of painting the professional norms of the academic setting into other realms.[32] Indeed, while plagiarism might be a sin in the academy, in other professional settings, it can be a virtue. Consider transactional law practice, where attorneys are routinely called upon to draft contracts and like instruments. In transactional law practice, it is no dark secret that attorneys rarely draft original documents; rather, they plagiarize other attorneys' work product.[33] If an attorney likes the wording of a warranty clause in a contract drafted by an unaffiliated attorney, it is no sin to copy that clause verbatim into a new document without giving the original drafter attribution.[34] In fact, most scholars argue that you *should* plagiarize other lawyers' work in transactional practice: first, because uniformity in contract language creates interpretive efficiencies; and second, because plagiarizing another attorney's work saves time and money.[35]

---

deal of inconsistency in both the reaction plagiarism elicits and the manner in which it is treated within and across sub-communities").

30. *See* David Nimmer, *The Moral Imperative Against Academic Plagiarism (Without a Moral Right Against Reverse Passing off)*, 54 DEPAUL L. REV. 1, 69 (2004) (observing that a plagiarism definition "expresses the 'house rules' that certain guilds—notably academics, but other domains as well . . . —have accepted upon themselves. Those who cross the line risk not liability in court to the general public, but rather being defrocked from the particular priesthood which maintains its special rules."); James Petersen & Jennifer Gregor, *Attorneys at Work: A Flexible Notion of Plagiarism*, LAW 360, October 7, 2011, at *6 ("[W]hether an act of copying without attribution is characterized as plagiarism depends on the needs of the institution in which it occurs.").

31. Stanley Fish, *Plagiarism Is Not a Big Moral Deal*, N.Y. TIMES, Aug. 9, 2010. Fish further offered that plagiarism rules are "less like the rule against stealing, which is at least culturally universal, than it is like the rules of golf. . . . It's an insider's obsession." *Id.*

32. For an example of a court expressly applying the academic rule to written practice, *see* Dewilde v. Guy Gannett Publ'g Co., 797 F. Supp. 55, 56 n.1 (D. Me. 1992) ("Plagiarism is unacceptable in any grammar school, college, or law school and *even* in politics. It is wholly intolerable in the practice of law.") (emphasis in original).

33. *See* Carol Bast & Linda Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty*, 57 CATH. U. L. REV. 777, 803-04 (2008) (reviewing that "[p]racticing attorneys customarily borrow from the writing of others, especially for transactional documents; in fact, it is fairly rare for an attorney to produce wholly original writing."); Marilyn Yarbrough, *Do as I Say, Not as I Do: Mixed Messages for Law Students*, 100 DICK. L. REV. 677, 678-79 (1996) ("[I]t is conceded that the circulation and reuse of documents and the use of forms is an acknowledged and accepted practice within the legal community.").

34. *See* Fed. Intermediate Credit Bank v. Ky. Bar Ass'n, 540 S.W.2d 14, 16 n.2 (Ky. 1976) ("Legal instruments are widely plagiarized, of course. We see no impropriety in one lawyer's adopting another's work, thus becoming the 'drafter' in the sense that he accepts responsibility for it.").

35. *See* TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 335 (2d ed. 2014) ("Almost all [contract] drafting done today begins with a precedent for two reasons. First, it is efficient. Precedents save time and money. Rather than reinventing the wheel for each new deal, a lawyer gets a head start. Second, if the precedent is a good one, using it will reduce errors and improve a contract's quality."); Bast & Samuels, *supra* note 33, at 803–04 (2008) (reviewing that a rule against copying in contract drafting would be "needlessly time intensive and, therefore, expensive. It might also be counter-productive, as identical language among transactional documents is

This is all a long way of saying that plagiarism is not a *malum se* offense; courts and professional tribunals cannot sanction plagiarism in a brief relying on presumed morality. Rather, a rule proscribing plagiarism must be premised on specific and identifiable institutional needs. And this is where *Cannon* and other cases sanctioning attorneys for plagiarism disappoint—they never quite explain why, exactly, an anti-plagiarism rule is worth enforcing. That is not to say, of course, that there might not be compelling policy goals underlying the rule. But the judicial omission is telling. Once you take a presumed universal morality off the table, it can be vexingly difficult to make sense of a rule against plagiarism in written practice.

Scholars that have tackled plagiarism in the round often remark that a coherent theory is surprisingly elusive.[36] Indeed, plagiarism doctrine proves so unexpectedly complicated that you begin to wonder if it is worth the chase. And, perhaps, this explains the courts' reluctance to go beyond conclusory explanations for their anti-plagiarism rule: a fuller explanation just doesn't seem worth the effort. After all, who is going to argue *in favor of* plagiarism?[37]

I will give it a shot: simply put, plagiarism saves time and money. Provided plagiarized materials are properly contextualized and edited, the plagiarizing attorney can take less time to produce effective written advocacy.[38] The existence

---

more likely to be interpreted consistently."); Claire A. Hill, *Why Contracts Are Written in "Legalese,"* 77 CHI-KENT L. REV. 59, 63 (2001) (observing that copying form documents "enables the product to be produced by lower-paid, less-senior and less-experienced lawyers."); Davida H. Issacs, *The Highest Form of Flattery? Application of the Fair Use Defense Against Copyright Claims for Unauthorized Appropriation of Litigation Documents*, 71 MO. L. REV. 391, 410 (2006) (observing that parties plagiarize contract language "precisely because of its accepted meaning, often established in case law. Using terms with accepted meanings helps parties ensure a mutual understanding and a 'meeting of the minds'").

36. *See* THOMAS MALLON, STOLEN WORDS: FORAYS INTO THE ORIGINS AND RAVAGES OF PLAGIARISM xiii (1989) (describing scholarly thinking about plagiarism as "primitive" and finding "generalizations on [the] subject to be . . . perilously porous"); REBECCA MOORE HOWARD, STANDING IN THE SHADOW OF GIANTS: PLAGIARISM, AUTHORS, AND COLLABORATION xviii–xx (1999) ("Until very recently, scholarly discussions of plagiarism assumed it to be a natural (though loathsome) category, not a constructed one; hence, these discussions did not undertake causal and evaluative arguments about the construction of plagiarism and the cultural work that this construction performs."); MARILYN RANDALL, PRAGMATIC PLAGIARISM: AUTHORSHIP, PROFIT, AND POWER vii (2001) ("Plagiarism is a slippery subject because, while almost everyone agrees on *what* it is, few agree on *where* it is to be found.") (emphasis in original); Frye, *supra* note 5, at 152 ("While innumerable scholars have studied plagiarism, the overwhelming majority has focused on its prevention. Passing few have asked whether and why plagiarism norms are justified. As a consequence, plagiarism is woefully under-theorized, and the justification for plagiarism norms is unclear.").

37. *See* HOWARD, *supra* note 36, at 108 (reviewing that modern studies of plagiarism "depict plagiarism as a unified field of transgression against common morals . . . . Those who would argue with the ethical paradigm are represented as enemies of traditional values, as victims of postmodern delusion, or as the uninformed."); *cf.* ST. ONGE, *supra* note 24, at 61 ("Challenging the plagiarism concept itself is the verbal equivalent of engaging the Mafia.").

38. Jonathan Band & Matt Schruers, Dastar*, Attribution, and Plagiarism*, 33 AIPLA Q.J. 1, 13–14 (2005) (observing that a strict rule against plagiarism in written practice would "require the continual 'reinvention of the wheel' at a client's expense" and "undermine the benefits of lawyers practicing as a group"); Petersen & Gregor, *supra* note 30, at *3 ("Why charge a client to create a document from scratch when you can draw concepts, structure and wording from a form agreement in a book, a brief prepared by a colleague or even a well-reasoned judicial opinion?"). The economic efficiency argument

of brief banks at many firms—from which associates are encouraged to plagiarize—is perhaps the best evidence of this economic efficiency.[39] The brief banks exist, of course, because plagiarizing from earlier work saves the firm and its clients' time and money.[40] Judicial efforts to promote a thick norm against plagiarism, then, stifle wider distribution of important economic efficiencies.[41]

Plagiarism as a cost-effective method of brief drafting finds most salience with attorneys who serve under-resourced clients. Peter Joy and Kevin McMunigal offer the persuasive example of a rural public defender plagiarizing a brief filed by a national advocacy group in order to cost-effectively represent an indigent client.[42] It is hard to dismiss the argument that a liberalized plagiarism regime might facilitate access to justice for under-resourced communities.[43] Consider that two out of three

---

in favor of plagiarism rests, of course, on a presumption that the plagiarizing attorney passes cost-savings on to the client. Notably, there is a species of plagiarism cases where the plagiarizing attorney did *not* pass on the cost-savings to clients; rather, the attorney billed the client as though he or she had taken the time to draft a wholly original brief. *See, e.g.*, Iowa Supreme Court Bd. of Prof'l Ethics and Conduct v. Lane, 642 N.W.2d 296 (Iowa 2002) (suspending attorney six months for plagiarizing brief and then charging client $16,000 for 80 hours of work on the brief); Columbus Bar Ass'n v. Farmer, 855 N.E.2d 462 (Ohio 2006) (suspending attorney for two years and requiring disgorgement of fees collected to draft plagiarized brief). These are, first and foremost, cases involving fraudulent billing, which, of course, requires a heavy sanction. I do not view these cases as relevant to plagiarism doctrine.

39. *See* Robin F. Hansen & Alexandra Anderson, *Law Student Plagiarism: Contemporary Challenges and Responses*, 64 J. LEGAL EDUC. 416, 420–21 (2015) (noting practice of sharing documents within a firm).

40. *See* Peter Joy & Kevin McMunigal, *The Problems of Plagiarism as an Ethics Offense*, 26 CRIM. JUST. 56, 57 (2011) (reviewing that firms and government offices encourage attorneys to plagiarize from brief banks "to avoid the delay and expense of creating litigation documents from scratch.").

41. *See* Isaacs, *supra* note 35, at 430 (observing the ability to copy other attorney's work "moves society towards a more optimal economic situation" by increasing "the ability of members of the public to obtain restitution for harm at a cheaper price."); N.C. Bar, Formal Ethics Op. 14 (2009) (rejecting sanction for attorney plagiarism in part on grounds that "the utilization of the work of others in this context furthers the interests of the client by reducing the amount of time required to prepare a brief and thus reducing the charge to the client.").

42. Joy & McMunigal, *supra* note 40, at 57–58.

43. *See* Issacs, *supra* note 35, at 396 (noting that cost-savings obtained by copying other attorneys' work promotes "access to adequate legal representation for more than simply our wealthiest citizens, and this benefit is a fundamental principle underlying the American justice system."). This affordability argument in favor of plagiarism has an important limitation. It is the plagiarist's act of copying, not the failure to give attribution to the original author, that saves time and money. In that sense, the economic efficiency argument champions only a liberalized *copying* norm where attorneys are free to copy wholesale a third-party's work. Why not, then, just a liberalized copying norm but one that still requires an attorney to give attribution to the original author? As an initial matter, courts admit to giving short shrift to long passages placed in quotes and given proper attribution. Thus, this advice from Justice Scalia: "Be especially loath to use a lengthy, indented quotation. It invites skipping. In fact, many block quotes have probably never been read by anyone. So never let your point be made only in the indented quotation." ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 128 (2008); *see also* Alex Kozinzski, *The Wrong Stuff*, 1992 BYU L. REV. 325, 329 (1992) (expressing a disdain for block quotes and suggesting judges do not read them). Moreover, even if a long block quote did not induce a reader to entirely skip the relevant analysis, in many cases, the attribution itself would make the argument *less* persuasive. An attorney plagiarist can copy from a variety of sources—earlier judicial opinions, the briefs of other attorneys, and secondary sources.

Americans would struggle to raise $1000 to pay for legal services.[44] This means that a wide swath of Americans, if they are able to obtain legal services in the first place, cannot reasonably pay for an attorney to take the time to write an original brief from scratch.[45]

If plagiarism allows some Americans to obtain legal services that would otherwise be out of their financial reach, then a rule against plagiarism exacts a social cost. For the purposes of this article, it is not necessary to precisely weigh the efficiency interests that would obtain if the current anti-plagiarism rule were abrogated. What matters is there are at least some costs associated with the existing norm against plagiarism in written advocacy. Against these costs, however modest they may be, must be balanced the values served by the anti-plagiarism rule.

*****

There are three parties whose interests might be served by the rule against plagiarism in a brief: the court, the client, and the original (plagiarized) author. If a court itself has an interest offended by plagiarism, it would arise out of the court's role as the intended audience of the plagiarized brief. However, as I review in **Part I** below, the court's claimed interest in original, non-plagiarized briefing is illusory. As others have noted, by any reasonable standard of judicial decision-making, courts do not review briefs for their originality; they review them solely to assess the merits of the embedded arguments.

Does plagiarism offend the client's interest? In **Part II**, I examine the argument that an anti-plagiarism rule is necessary to protect clients' interests because plagiarism goes hand-in-hand with incompetent motion practice. But this argument rests on the faulty premise that there is a material correlation between plagiarism and incompetent practice. In a world of brief banks and other mechanisms of competent plagiarism, that premise does not withstand scrutiny. If anything, the stronger presumption is that most plagiarism is competently executed and serves the client's interests by allowing an attorney to produce an effective brief at a lower cost.

Finally, there are the original authors, whose interests I examine in **Part III.** In the first place, plagiarism might infringe upon an original author's copyright

---

Imagine if an attorney copied from an uncitable unpublished decision or from a decision of a lower court from a far-flung jurisdiction. Or perhaps plagiarized from another attorney's brief found online. It is certainly conceivable that the arguments presented would be less persuasive to a court if an attorney were compelled to give attribution to the originating source. *See* Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 UTAH L. REV. 787, 796–98 (2007) (reviewing circumstances where a rule of attribution would distract audiences from goal of text); POSNER, *supra* note 5, at 62–64 (discussing "awkwardness of acknowledgment" that might undermine impact of a copied writing).

44. *See generally* Don Lee, *Nearly Half of U.S. Households Would Struggle with an Unexpected $400 Expense, Fed Study Finds*, L.A. TIMES, May 25, 2016; Ken Sweet & Emily Swanson, *Poll: Two-thirds of US Would Struggle to Cover $1,000 Crisis*, AP NEWS, May 19, 2016.

45. While the question eludes precision, it seems a reasonable presumption that a "from-scratch" brief involving independent research, precise analysis, and crafted paragraphs and sentences would bill out at more than $1000.

interest. But as I review in **Part IIIA**, it is unclear why courts would be interested in proactively monitoring what is essentially an economic interest of a party foreign to the case under supervision. And, in any event, the copyright interests offended by plagiarism in a brief are barely perceptible; they fall far short of offering a counter-weight to the democratic access-to-justice values that would be served by full abolition of the plagiarism rule.

In any event, most legal writers finding their work plagiarized in a brief would not feel an economic harm so much as a dignitary one. In **Part IIIB**, I explore the argument that irrespective of copyright, plagiarism in written practice offends an original author's non-economic attribution interest—roughly, the right to any esteem that might flow from the work. I conclude, however, that this "moral rights" theory of plagiarism is founded on an antiquated "romantic" model of individual authorship that hardly reflects modern written practice, which is often collaborative and always derivative. In the end, a legal writer's dignitary interests offended by any act of plagiarism in a brief are just too diffuse to discern, much less enforce.

I. THE COURT'S INTEREST

The strength of the judicial language used to describe lawyer plagiarism—"reprehensible," "obnoxious," "wholly intolerable"—leaves the impression that a lawyer's plagiarism personally offends the court, undermining its very ability to administer justice in a case. Perhaps there is something to this: the court is the intended audience of a plagiarized brief, and enforcing an anti-plagiarism rule makes perfectly good sense when plagiarism undermines the interests of the intended audience.

In *The Little Book of Plagiarism*, Judge Posner explained plagiarism norms from a law and economics perspective.[46] In Posner's telling, an institution's plagiarism norm can be rationally (read: economically) explained by a focus on whether the intended audience "detrimentally relies" on plagiarized work.[47] That is, if the intended audience is induced to take some sort of action believing the submitting writer's ideas and prose are original, then plagiarism is rightly disfavored.[48]

Thus, under the detrimental reliance theory, plagiarism is proscribed in the academy because the intended audience takes a particular course of action relying on a presumption that the submitted writing is original.[49] The professor awards a student writer a grade along a class curve on a presumption that the student's work

46. POSNER, *supra* note 5, at 10.

47. *Id.* at 19; *see also* RANDALL, *supra* note 36, at 15 (observing that one feature of historical plagiarism definitions is that it is "a misrepresentation of one's self in situations where the justified expectations of others entail honesty and authenticity; in other words, it is a form of *fraud*.") (emphasis in original); ST. ONGE, *supra* note 24, at 101 (suggesting that plagiarism is an intentional verbal fraud for "unearned advantages").

48. POSNER, *supra* note 5, at 19–20.

49. Joy & McMunigal, *supra* note 40, at 57–58 (observing that plagiarism norms prevail in the academy because "[o]riginality is a critical criterion in assessing the quality of such work.").

is original. A faculty committee awards a colleague tenure on a presumption that colleague's scholarship is original. In either context, if the intended audience knew that the work was *not* original, the audience would have responded in a materially different manner: The professor would have awarded the student a lower grade;[50] the faculty committee would have denied their colleague tenure.[51] Through the prism of detrimental reliance, the thick norm against plagiarism in the academy finds an easy theoretical purchase.

To turn the coin, in transactional law practice, the intended audience for an attorney's work product is made up only of the parties to the contract in question. The parties to a contract do not rely in any manner on a presumption that their contract was originally composed; they take no action on a belief that the written contract is an attorney's wholly original composition.[52] Through the prism of detrimental reliance, then, the norm *tolerating* plagiarism in transactional practice also finds solid purchase.

The detrimental reliance theory is persuasive, but does it vindicate a rule against plagiarism before the courts? The operative question becomes whether the courts rely to their detriment on a presumption that the analysis and writing in a brief are original. Asked another way, relying on a presumption that a brief is an original work product, does a court take some material action it would not take if the court was aware that the brief in question was largely plagiarized? Plainly, the answer is no.

The suggestion that a court might rule one way presuming counsel submitted original work, but rule another way if the court were aware that counsel's work was not original is deeply problematic. Imagine a judge explaining that "had I known the analysis in the brief was not original, I would have decided the case differently." As others have noted, this notion cannot be squared with any reasonable theory of judicial decision-making: courts are charged with resolving cases based on the force of the arguments presented, not their originality.[53] Tellingly, a number of courts

---

50. *See* POSNER, *supra* note 5, at 47 (reviewing unfair advantage obtained by plagiarist in a classroom where grades are awarded based on original production); *see also* Hansen & Anderson, *supra* note 39, at 420–21 (2015) (observing that in law school, plagiarists "unfairly" compete for grades among their peers).

51. Bast & Samuels, *supra* note 33, at 793 ("If scholarship is represented as original when it is not, reviewers are relying on a material misstatement in their decision-making."); *see also* Klinge v. Ithaca Coll., 634 N.Y.S.2d 1000 (Sup. Ct. 1995) (upholding demotion of tenured professor based on plagiarism offense).

52. *See* POSNER, *supra* note 5, at 20 ("The reader has to *care* about being deceived about authorial identity in order for the deceit to cross the line to fraud and thus constitute plagiarism.") (emphasis in original).

53. Petersen & Gregor, *supra* note 30, at *8 ("[T]he court's purpose in reviewing a brief is not primarily to evaluate the personal creativity and skill of the lawyer, but to learn the law, apply it to the facts and decide the controversy. Most unacknowledged copying does not degrade the integrity of the court, given its purpose."); Benjamin Shatz & Colin McGrath, *Beg, Borrow, Steal: Plagiarism vs. Copying in Legal Writing*, 26 CAL. LITIG. 14, 15 (2013) ("Legal arguments are presented to courts for evaluation of their merits, not their origins. The quality of an attorney's presentation may be a factor of its persuasiveness, but is not itself directly evaluated."); *cf.* Douglas Abrams, *Plagiarism in Lawyers'*

admonishing counsel for plagiarism take pains to explain that the plagiarism did *not* impact their decision-making.[54] That is, the courts acknowledge that to resolve the case before them, they have *not* relied on a presumption that the lawyers' briefs were originally composed.

Still, while courts may not reasonably rely on a presumption of originality when resolving particular cases, the norm against plagiarism might arguably address more informal forms of detrimental reliance. The court reviewing a plagiarized brief might, for instance, develop a higher professional respect for a plagiarizing attorney based on a belief that a quality brief was the attorney's own work product. Perhaps a norm against plagiarism protects against a lawyer's misrepresentation of his or her professional skill.

But here you run into what might be called the "plagiarizing senior attorney" contradiction. It is not news that senior attorneys often file briefs under their own signature that are largely plagiarized from the work of junior attorneys.[55] (There is also the practice of judges signing briefs largely written by their clerks.)[56] Surely, in

---

Advocacy: Imposing Discipline for Conduct Prejudicial to the Administration of Justice, 47 WAKE FOREST L. REV. 921, 931 (2012) (quoting court of appeals Judge John Godbold: "Cases are won on the facts and the law, not on the eminence, polished writing, oratory, or personality of counsel.").

54. *See* United States v. Jackson, 64 F.3d 1213, 1219 n.2 (9th Cir. 1995) ("We separate the merits of the issues raised from the conduct of counsel . . . ."); Frith v. State, 325 N.E.2d 186, 188–89 (Ind. 1975) ("In spite of the brief-writer's disregard for [plagiarism norms], we have considered Appellant's legal arguments as if they had been properly [cited]."); Vasquez v. City of Jersey City, No. 03-CV-5369 (JLL), 2006 WL 1098171, at *8 (D.N.J. Mar. 31, 2006) (noting that "Court's opinion has not been affected by defense counsel's unprofessional submission"). Notably, whether the courts truly "detrimentally rely" on originality in a brief has already been litigated in the context of "legal ghostwriting," the practice where an attorney drafts, as part of unbundled legal services, a brief for a pro se litigant to file. A persistent early ethical question about the practice was whether the ghostwriting attorney (or the pro se litigant) must disclose the attorney's authorship. *See generally In re* Fengling Liu, 664 F.3d 367 (2d Cir. 2011). Early in the debate, those favoring a disclosure rule asserted detrimental reliance, arguing that courts, relying on a presumption of original authorship, might extend pro se litigants solicitude that would not be offered if the court knew of an attorney's role in authoring a pleading. *See, e.g.*, Duran v. Carris, 238 F.3d 1268, 1271–72 (10th Cir. 2001) (holding attorney's action providing legal assistance to pro se litigant without disclosing relationship to court improperly affords pro se litigant the benefit of the "court's liberal construction of pro se pleadings."). In 2007, however, the ABA's Standing Committee on Ethics and Professional Responsibility issued a formal opinion that attorneys need not disclose the nature of their assistance to a pro se litigant. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007). The standing committee specifically rejected the detrimental reliance argument, finding no merit in the notion that a court's decision-making might be informed by the identity of the author of a pleading. *Id.*

55. Lisa G. Lerman, *Misattribution in Legal Scholarship: Plagiarism, Ghostwriting, and Authorship*, 42 S. TEX. L. REV. 467, 469 (2001) (reviewing practice where an associate at a law firm "may write memos, briefs, and articles, many of which will be filed, circulated, or published without his name on them or with his name listed after the names of more senior lawyers in the firm."); Joy & McMunigal, *supra* note 40, at 57 (reviewing practice where "the name of a lawyer who did no actual research or writing, such as a partner or local counsel, may appear prominently on a brief or pleading.").

56. *See* POSNER, *supra* note 5, at 20–21 (reviewing that only a small minority of judges write their own opinions). A related practice is courts' issuance of orders and opinions that largely plagiarize one of the party's submissions. *See* Douglas R. Richmond, *Unoriginal Sin: The Problem of Judicial Plagiarism,* 45 ARIZ. ST. L.J. 1077, 1079 (2013) (observing widespread practice of courts adopting wholesale from proposed orders submitted by a party); *see also* Jaime S. Dursht, Note, *Judicial*

some corners, these senior attorneys burnish their professional reputations on the back of the unattributed work product of more junior attorneys. But it is beyond dispute that these practices do not raise the judicial eyebrows.[57] If courts were truly concerned that plagiarism distorts a lawyer's professional attributes, these practices would not be roundly tolerated.

II. THE CLIENT'S INTERESTS

With the conclusion that plagiarized briefs do not offend any legitimate interest of the courts, the question becomes whether a plagiarized brief might offend some interest of the client. In the first, it's important to note that the efficiencies of plagiarism—the savings in cost and time—properly redound to the benefit of the client. If plagiarism in a brief competently presents the client's case *and* saves the client money, from the client's perspective, there is much to like. But that conclusion rests, of course, on the premise that plagiarism can be a part and parcel of a competent brief. Notably, many courts appear to have rejected this premise, effectively equating plagiarism with incompetent brief drafting. In this sense, the courts tacitly endorse the argument that a norm proscribing plagiarism serves as an important bulwark against incompetent practice.

Consider the so-called "Lindsay Lohan" plagiarism case. In March 2011, the recording artist known as Pitbull released a song with a verse that referenced the actress Lindsay Lohan by name.[58] Ms. Lohan did not appreciate the name-drop, and she retained New York Attorney Stephanie Ovadia to sue Pitbull and his record

---

Plagiarism: It May Be Fair Use but Is It Ethical, 18 CARDOZO L. REV. 1253, 1294–96 (1996) (arguing in favor of amendments to Canon 2 of the Model Code of Judicial Conduct to discourage judicial plagiarism). A number of appellate courts have heard due process challenges by losing parties after a trial court issued an opinion parroting near verbatim the prevailing parties' papers. While appellate courts are skeptical of judicial plagiarism, they have stopped short of banning the practice. *See, e.g.*, Anderson v. City of Bessemer City, 470 U.S. 564, 572 (1985) ("[O]ur previous discussions of the subject suggest that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous.").

57. *See* POSNER, *supra* note 5, at 21, 25 (observing that the practice of senior attorneys and judges submitting another attorney's work under their own signature is widely known and tolerated). Under his law and economics analysis, Posner explains that detrimental reliance principles are not offended by the plagiarizing senior attorney because, in effect, everyone knows that the senior attorney did not draft the brief that he filed under his signature. *Id.* at 20–22. To Posner, because industry insiders are aware of the practice, there is no concealment, and in the absence of concealment, the detrimental reliance element of plagiarism is missing. *Id.* at 17–19. This logic is appealing and would seem to invite a defense of all attorney plagiarism on grounds that everyone knows that lawyers rarely submit wholly original work (Posner did not reach the discrete issue of attorneys plagiarizing from third-parties). Still, I think a more persuasive explanation for tolerance of senior attorneys' and judges' plagiarism of junior attorneys' written work rests on "work for hire" principles. *See infra* note 82 and accompanying text.

58. *See* Lohan v. Perez, 924 F. Supp. 2d 447 (E.D.N.Y. 2013). The song at issue was titled "Give Me Everything." *Id.* at 451. Roughly one-third of the way into the song, the following verse is offered: "*So, I'm tiptoein', to keep flowin'/I got it locked up like Lindsay Lohan*." *Id.*

company.[59] The suit was not well-founded, and Pitbull's attorneys quickly filed a motion to dismiss.[60] In turn, Attorney Ovadia's office filed a brief opposing dismissal. The brief was a clutter of plagiarism.

In a published opinion, the court observed that "the vast majority of Ovadia's brief appears to have been taken from other sources without any acknowledgment or identification of the sources."[61] Among the cut and pasted sources were a periodical named Art World, case law, other firm's websites, articles found on the web, and Wikipedia.[62] Moreover, the brief itself, including the embedded plagiarism, was taken nearly verbatim from a legal memorandum that Ovadia's office had previously filed in an entirely different case.[63] Thus, the brief was "rife with irrelevant discussion;" it "did not meaningfully address Defendant's arguments," and "it cited a case that had been subsequently reversed."[64]

Contempt for Attorney Ovadia's incompetent motion practice is well-placed.[65] Indeed, Ovadia's filed brief seems fine-tuned for a sanction under Model Rule 1.1's duty of competence. But the court did not sanction Ovadia for incompetence; it sanctioned only Ovadia's plagiarism, which the court found "obviously" unacceptable.[66] In turn, the New York court, like the Iowa court in *Cannon*, used the plagiarism offense to fashion a sanction under Model Rule 8.4(c)'s prohibition of "misrepresentation."[67]

---

59. Attorney Ovadia filed a complaint under New York's Civil Rights Law, which, among other provisions, affords citizens a right of privacy that precludes others from using their name and personality for purposes of commercial benefit. *See id.* at 453–54. On its face, the statute does seem to endorse Ms. Lohan's lawsuit. *Id.* But the New York law is pocketed with exceptions that plainly insulated Pitbull's namedrop from triggering liability. *Id.* at 455–56.

60. *Id.* at 450.

61. *Id.* at 458.

62. *See id.*

63. *Id.* at 458 n.6.

64. *Id.* It was Pitbull's legal team that discovered Ovadia's plagiarism; it filed a motion for Ovadia to be sanctioned. *Id.* at 457. With the motion, the legal team filed a self-styled "Similarity Report" tracking Ovadia's alleged plagiarism in remarkable detail. *Id.* at 458 n.7. Notably, the defense scheme left the court "underwhelmed"; it tersely rejected the defendants' claim that they should receive any fines imposed. *Id.* at 461 n.13.

65. There was a dispute as to whether Attorney Ovadia or an affiliated attorney drafted the offending brief. The dispute was of no consequence to the court: "It is clear, however, that only Attorney Ovadia signed the Opposition. In the Court's view, this leaves Attorney Ovadia solely liable for the sanctionable plagiarism." *Id.* at 460.

66. *Id.*

67. *Id.* at 460 n.12. The court imposed a $750 fine for Ovadia's motion practice, but noted that, while the fine was "a relatively modest amount," it "accounted for (and does not underestimate) the negative impact on Attorney Ovadia's reputation and livelihood that will inevitably arise from her involvement in this situation." *Id.* The court was right about the negative attention. *See, e.g.*, Natalie Finn & Baker Machado, *Pitbull on the Attack: Accuses Lindsay Lohan's Attorney of. . .Plagiarism?!*, E NEWS (Mar. 23, 2012, 3:49 PM), https://www.eonline.com/news/303676/pitbull-on-the-attack-accuses-lindsay-lohan-s-attorney-of-plagiarism [https://perma.cc/7HXS-2GXP]; Eriq Gardner, *Lindsay Lohan's Lawyer Accused of Plagiarism in Pitbull Lawsuit (Exclusive)*, HOLLYWOOD REP. (Mar. 22, 2012, 11:15 PM), https://www.hollywoodreporter.com/thr-esq/lindsay-lohan-pitbull-lawsuit-lawyer-accused-plagiarism-303440 [https://perma.cc/4FJL-3KX8].

To be sure, the Ovadia matter demonstrates that plagiarism can be part and parcel of an incompetent motion practice. And there are other cases where courts have likewise hinged a plagiarism sanction on an argument that counsel's plagiarism led to an unhelpful, incompetent brief.[68] But do these cases offer a compelling correlation between plagiarism and incompetent practice? Surely, plagiarism can sometimes lead to a deficient filing. But it can also surely produce competent briefing. Recall that Peter Cannon was caught because of the "high quality of his brief." Recall also the widespread use of "brief banks" in many legal organizations, which expressly invite plagiarism in the interests of cost-savings. Is this reliance on brief banks producing an epidemic of incompetent motion practice? Of course not. Rather, the reasonable presumption is that most plagiarism is competently executed—so much so that it passes by unnoticed.

In the end there are serious overbreadth issues with a rule that seeks to ban all plagiarism on grounds that it is *sometimes* a component of deficient motion practice. As Peter Joy and Kevin McMunigal have argued, the better approach for regulating conduct like Attorney Ovadia's is for courts to proceed exclusively under Model Rule 1.1's duty of competence.[69] Regulating incompetence through an anti-plagiarism rule simply doesn't make sense; it expresses a distortedly broad proscriptive rule.[70]

I find more appealing the argument that a plagiarism proscription encourages competent practice because, by compelling largely original analysis, the rule assures that a lawyer fully commands the law and facts of her case. Legal writing scholarship has long recognized the "cognitivist school" of composition theory, which posits that writing not simply a recitation of already fully-formed knowledge; rather,

68. *See, e.g.*, Pagan Velez v. Laboy Alvarado, 145 F. Supp. 146, 160–61 (D.P.R. 2001) (admonishing counsel's plagiarism in brief which "did not fully address all the arguments raised in Defendants' motion for summary judgment."); USA Clio Biz, Inc. v. N.Y. State Dep't of Labor, No. 97 CV 250, 1998 WL 57176 at *2–3 (E.D.N.Y. Jan. 3, 1998) (noting that plagiarized brief was "so factually inaccurate and so wholly unresponsive to the issues at hand that it seemed to the Court to have been written for a matter other than the one at bar").

69. *See* Joy & McMunigal, *supra* note 40, at 49–50.

70. *See* Shatz & McGrath, *supra* note 53, at 18 ("[A]ttaching the 'plagiarism' label to all forms of attorney copying masks the true ethical concerns involved — namely, whether the attorney drafted an argument tailored to the specific facts and circumstances of the case and was diligent in researching the law and finding up-to-date, relevant supporting authority.").

writing itself is a potent element of building knowledge.[71] In the words of legal writing scholar Mary Beth Beazley:

> [W]e now realize that writing is more than the hands taking dictation from the brain. When we write, we engage in brainstorming with ourselves. We question and challenge our presumptions, discover new ways of thinking about something and gain insights that had not occurred to us before we began to write.[72]

I do not quarrel with the notion that by "writing" her case, an attorney obtains a fuller command of her argument. As an aspirational goal for practice, original composition as a norm has much to argue for. But the economic reality remains that many of those in need of legal services simply do not have the resources to pay for their lawyer's "high-end" cognitivist endeavors.[73] For these under-resourced Americans, a plagiarized brief is surely better than no brief at all.

III. THE ORIGINAL AUTHOR'S INTEREST

If neither the courts nor clients are cognizable "victims" of plagiarism, we are left with the plagiarized authors themselves. The argument that an anti-plagiarism rule is necessary to protect the interests of original authors has immediate appeal.

---

71. *See, e.g.*, J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 54–55 (1994) ("Traditional views of writing—embodied in the formalist perspective—are characterized by a sense that the primary function of writing is communication. In the epistemic view, writing is used not only to communicate knowledge, but also to generate knowledge. That is, writing plays a role in thinking."). The efficacy of legal writing courses in American law schools turns on these cognitivist impacts of the writing process: The first year legal writing curriculum is not valuable because it teaches the "skill" of memo and brief writing; rather, it is valuable because it harnesses the cognitive processes of writing to teach the deeper logic of legal reasoning. *See, e.g.*, Philip C. Kissam, *Thinking (By Writing) About Legal Writing*, 40 VAND. L. REV. 135, 140 (1987) ("This focus on instrumental writing misses the fundamental point that the writing process itself can serve as an independent source, or critical standard, that alters and enriches the nature of legal thought."); *see also* Mary Beth Beazley, *Better Writing, Better Thinking: Using Legal Writing Pedagogy in the "Casebook" Classroom (Without Grading Papers)*, 10 LEGAL WRITING: J. LEGAL WRITING INST. 23, 48 (2004). Thus, even if plagiarism in practice should be largely tolerated, it does not necessarily follow that students should be taught the "skill" of plagiarism in law school, at least not in the first year when the so-called "cognitive apprenticeship" is paramount. *See* Robin F. Hansen & Alexandra Anderson, *Law Student Plagiarism: Contemporary Challenges and Responses*, 64 J. LEGAL EDUC. 416, 420–21 (2015) (reviewing prevalence of non-attribution in practice but arguing that plagiarism must necessarily be proscribed in law school because of pedagogical values of original composition);*see also* Kim D. Chanbonpin, *Legal Writing, the Remix: Plagiarism and Hip Hop Ethics*, 63 MERCER L. REV. 597, 633–34 (advising law professors to help students avoid cut-and-paste plagiarism in favor of "expert remixing"). On the other hand, Rebecca Moore Howard has argued that the strict academic intolerance of plagiarism undermines the pedagogical value of "patch-writing," which she describes as copying from a source text and then deleting some words, "altering grammatical structures, or plugging in one-for-one synonym substitutes." Rebecca Moore Howard, *A Plagiarism Pentimento*, 11.3 J. TEACHING WRITING 233, 233 (Summer 1993). Moore persuasively argues that patch-writing is an effective method of composition to introduce students to new ideas and vocabulary and that the academy's strict anti-plagiarism rules undermine "our students in their efforts to assimilate the constructs of unfamiliar discourse." *Id.*

72. MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 7 (10th vol. 2014).

73. *See supra* notes 41–45 and accompanying text.

There is always the sense that the plagiarist has "stolen" something from the original author; hence, the oft-cited definition of plagiarism as "literary theft".[74]

But what exactly has the plagiarizing attorney stolen from an original author? First, there is the original author's interest in controlling the copying of her work. This is an economic interest well-defined by American copyright law. At bottom, it is the right to charge a reasonable fee for the copying of one's original work. Second, there is the original author's "moral" interest in receiving attribution for her work; this is a non-economic, dignitary interest—a right to receive, as it were, the "esteem" that might flow the work.[75]

Certainly, one can contemplate a hypothetical where an attorney's plagiarism might offend these interests of original authors. However, when examined against the backdrop of practice realities, both the original author's copyright interest and her dignitary interest in attribution are nearly imperceptible. They simply do not countervail the important access-to-justice values that would be served by tolerance of plagiarism.

A. Copyright Interests

As an initial matter, a "copyright protection" theory of plagiarism suffers from a foundational misapprehension. The goal of copyright is to protect a writer's economic interest in controlling the copying of her work.[76] But with the plagiarism offense, copying the work of another is only a predicate act; it is the subsequent failure of attribution that is the essential element.[77] And American copyright law is largely disinterested in attribution. For sure, if you own a copyright in a work, as a condition of license you can demand attribution.[78] But in the many circumstances where there is no enforceable copyright, American intellectual property law does not recognize a right to attribution.[79]

And even if the plagiarism offense was properly concerned with copyright, it's not clear why the courts would be so interested in proactively monitoring the private economic interests of a party wholly unrelated to the litigation. If an attorney's

---

74. *See* ST. ONGE, *supra* note 24, at 6 (reviewing multitude of "felonious parallels" ascribed to the act of plagiarism).

75. *See generally* RANDALL, *supra* note 36, at 14 (suggesting plagiarism doctrine serves two interests—one defined by market value and the other defined by "the symbolic or aesthetic value of a discourse").

76. *See* POSNER, *supra* note 5, at 46–47 (observing that "[c]opyright infringement is the invasion of a property right. It is like joyriding, that is, 'renting' a car without paying any rent.").

77. *See* ALEXANDER LINDEY, PLAGIARISM AND ORIGINALITY (1951) ("There can be no plagiarism without the thief passing as the originator. The essence of the wrong . . . is the misappropriation of the fruits of another person's mental labor and skill.").

78. Thus, the familiar "Creative Commons" license, where a scholar controlling a copyright provides a license to the public to copy his work on condition that the scholar is given attribution.

79. Band & Schruers, *supra* note 38, at 4–5 (contrasting copyright and plagiarism); Frye, *supra* note 5, at 165 (observing that attribution is irrelevant under copyright law); Robert Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1997 (2006) (explaining that copyright law does not specifically protect against misattribution).

plagiarism in a brief causes some real economic harm, the original author, if she enjoys a worthy copyright, can protect her own interests. Notably, sophisticated litigation practices long ago began affixing a copyright to their pleadings. And law firms have threatened legal action to protect their interests against bad faith actors.[80] With copyright holders able to protect their own interests and judicial resources limited, one is hard-pressed to make sense of the court's proactive monitoring of third-party copyright interests through a professional rule against plagiarism.

That said, while the "copyright-protection theory" of plagiarism is an imperfect tool for addressing attribution rights, it nonetheless offers ready-made law; relying upon copyright law spares the courts from having to enter the quagmire of plagiarism doctrine. And copyright law does offer rules that might bring some coherence to plagiarism doctrine. Consider the "senior partner plagiarist contradiction" that describes how courts condemn plagiarism generally while wholly tolerating the practice of senior attorneys plagiarizing junior attorneys. Copyright law easily resolves this tension through application of "work for hire" principles—the senior attorney "owns" the attribution right by dint of the employer-employee relationship.[81]

Still, the circumstances in which a plagiarized brief might infringe on a copyright are difficult to conjure. Lawyers submitting arguments to the court generally plagiarize from three sources: judicial opinions, other attorneys' briefs, and secondary sources. Copying from judicial opinions simply does not raise copyright issues—judicial opinions are solidly in the public domain and can be copied by anyone for any reason. And copying from other attorneys' briefs or secondary sources, except in the most extreme circumstances, is fair use under the Copyright Act. In the end, while copyright law may bring some coherence to plagiarism doctrine, the anti-plagiarism rule that it supports is so pinched that it hardly seems worth the effort.

1. Judicial Opinions

The rule that judicial opinions are solidly in the public domain and beyond any claim to their copyright is well founded. The United States Supreme Court first

80. *See* Thomas G. Field, Jr., *From Copyright to Law in Copyright*, 49 IDEA 125, 131 (2008) (discussing copyright disputes over copying of litigation documents in national class action practice); Issacs, *supra* note 35, at 392 (reviewing copyright infringements claims being asserted among national class action firms; one firm was plagiarizing the "narrative" complaints of the other while competing for class counsel action).

81. *See* 17 U.S.C. § 201(b) (2012). Section 201(b) provides that "'in the case of a work made for hire,'" employers are considered authors for the purposes of copyright, unless there is written agreement otherwise. *See also* Field, *supra* note 80, at 135–45 (discussing work for hire principles in the academic setting); Issacs, *supra* note 35, at 400 ("[A] law firm associate's legal works are 'works made for hire,' and the law firm itself is considered the author of those works."). A more challenging question is whether under "work-for-hire" principles, the paying client is in fact the owner of a copyright in a brief. *See generally* Issacs, *supra* note 35, at 400–01.

announced the rule that federal opinions enjoy no copyright in 1834.[82] The rule was later written directly into the Copyright Act.[83] It is technically true that no court has ever been called to consider whether state courts might assert copyright in their opinions.[84] But that is presumably because the logic of a rule against copyright in court opinions is unimpeachable.[85]

To begin, there is a compelling "work for hire" notion: it is the public that pays judges to write opinions; it reasonably follows that those opinions are collectively owned by the public. As the Supreme Court explained over a century ago: "Judges, as is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors."[86]

But it is not simply that the public necessarily owns the work of government employees, there is also the "metaphorical concept of citizen ownership" whereby "[t]he citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process."[87] Finally, there are due process considerations underlying the rule against copyrighting statutes and judicial opinions. In order to hold citizens responsible for abiding with the laws, they must have free access.[88] In sum, under a copyright protection theory of plagiarism, there is no basis for sanctioning plagiarism of a court opinion. There is simply no copyright interest to vindicate.

---

82. Wheaton v. Peters, 33 U.S. 591, 668 (1834) ("[We] are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right."); *see also* Banks v. Manchester, 128 U.S. 244, 254 (1888) ("The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute".).

83. The Copyright Act denies protection to "work of the United States Government." 17 U.S.C. § 105 (2006).

84. The most analogous modern case law considers whether the drafter of a model building code can claim copyright after adoption by a local government. These cases resolve against copyright based on "democratic values" that would apply with equal or greater force to state judicial opinions. *See* Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 793 (5th Cir. 2002).

85. *See* Field, *supra* note 80, at 128–29 (observing it is likely that the "Supreme Court would refuse copyright for state court opinions.").

86. *Banks*, 128 U.S. at 253–54.

87. Bldg. Officials & Code Adm. v. Code Tech., Inc., 628 F.2d 730, 734 (1st Cir. 1980) (quoting Banks v. West, 27 F. 50, 57 (C.C.D. Minn. 1886)).

88. *See id.* (noting "the very important and practical policy that citizens must have free access to the laws which govern them. This policy is, at bottom, based on the concept of due process.").

2. Other Attorneys' Briefs

Whether an attorney holds a copyright interest in an original brief filed with a court is an open question.[89] But the considerations placing judicial opinions in the public domain also argue for a rule that once a brief is filed with the court, it too becomes part of the public domain. While the public may not compensate attorneys directly for their written work, the public does subsidize the courts, providing both the lawyer and her client access to the public justice systems. It is an entirely reasonable proposition that in fair exchange for reliance on the public courts, briefs filed there become part of the public domain.[90]

Nonetheless, most scholars, albeit without considering the "fair exchange" argument above, generally accept that litigation documents, especially briefs, can be sufficiently original and creative to qualify for copyright protection.[91] But most scholars also accept that democratic values weigh heavily in favor of labeling as "fair use" one advocate's plagiarism of another.[92]

In American copyright law, the fair use doctrine contemplates that an otherwise cognizable copyright should not be enforced where a substantial public good would flow from the free dissemination of the work.[93] Here, of course, the

89. *See* Issacs, *supra* note 35, at 402 (observing that the copyrightability of litigation documents has not yet been addressed by the courts). The issue has only become salient recently as electronic databases have made briefs both easily searchable and easily "cut and pasted." *See id.* at 398.

90. A related, but ultimately unpersuasive argument is that because unsealed litigation documents automatically become part of the "public record," they are beyond copyright protection. However, as one district court explained, if filing a public record transformed the document into the public domain, "James Joyce's *Ulysses* . . . would lie within the public domain merely because the United States prosecuted the book . . . a generation ago." Marvin Worth Prods. v. Superior Films Corp., 319 F. Supp. 1269, 1271 (S.D.N.Y. 1970) (cited in Carolyn Elefant, *Are Legal Briefs Copyrightable?: Yes or No and Why it Matters*, 2 No. 4 E-FILING REP. 8 (Mar. 2002)).

91. *See* Ralph Clifford, *Intellectual Property Rights in an Attorney's Work Product*, 3 S. NEW ENG. ROUNDTABLE SYMP. L.J. 1 (2008) (reviewing that most attorney litigation documents drafted by an attorney would be "sufficiently creative for copyright protection to be available."); 1 NIMMER ON COPYRIGHT § 2A.11 (2018) ("There is no validity to the notion that, by virtue of being filed in court, legal pleadings lose copyright protection."); Issacs, *supra* note 35, at 394 (locating sufficient original creative expression in many litigation documents sufficient to qualify for protection); Petersen & Gregor, *supra* note 30, at 3 ("A legal brief would likely qualify for more substantial copyright protection, comparable to that afforded a piece of nonfiction writing. The incorporated facts and ideas, of course, would not be protected, but the structure and rhetoric of a brief would constitute protectable expression.").

92. Section 107 of the Copyright Act allows for "fair use" of a copyrighted work without permission based on four non-exclusive statutory factors: "1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107 (2012). The enumerated considerations are only guideposts, they are "not exhaustive and do not constitute an algorithm that enables decisions to be ground out mechanically." Chi. Bd. of Educ. v. Substance Inc., 354 F.3d 624, 629 (7th Cir. 2003) (Posner, J.).

93. *See* Issacs, *supra* note 35, at 426 (reviewing that "fair use" doctrine applies "where dissemination of some works creates a significant social benefit unlikely to be addressed by private transactions").

public good at play is the core democratic value of access-to-justice. Again, building a brief by copying other attorneys' work can be quite cost-effective, enough so that it brings legal services within reach of those who cannot afford a lawyer's original work.[94] Recognizing this, even scholars who are otherwise optimistic of a private market for briefs[95] acknowledge that democratic values should nonetheless limit copyright protection of briefs "in order to ensure access to law and to ensure the availability and competence of legal services."[96]

I'll suggest a second democratic value weighing in favor of one attorney's copying of another as constituting "fair use". Attorneys are officers of the court and the key players in our adversarial system of justice—a system that contemplates that through the battle of arguments, justice is obtained. All lawyers participate in this exercise; each one of our briefs becomes part of a repository of arguments through which the law evolves. From this view, to allow attorneys to hoard their arguments with copyright protection upends the genius of the common law.[97]

Finally, it is worth noting that the key policy arguments in favor of copyright protection lose purchase in the context of legal practice. Consider copyright's policy goal of incentivizing writers to do their very best work by providing them a protected economic interest in their final product. In our context, the policy argument would be that attorneys drafting briefs need the protection of copyright in order to be incentivized to do their best work. But the notion that lawyers, in the absence of copyright protection, might offer clients something less than their best work subverts the ethical rules. As Model Rule 1.1 makes plain, the obligation to

---

94. *See infra* notes 38–46 and accompanying text.

95. Some scholars contemplate that enforcing copyrights in this realm could foster an efficient market where attorneys license their briefs to other attorneys in exchange for a fee. *See, e.g.*, Bruce H. Kobayashi & Larry E. Ribstein, *Law's Information Revolution*, 53 ARIZ. L. REV. 1169, 1198–99 (2011).

96. *Id.* at 1176. *See also* Clifford, *supra* note 91, at 34 ("A work-product document being used in litigation would seem to at least touch on the sort of purpose that Congress indicated is more likely to be fair use. As with the categories expressly stated, litigation advances democracy, a core value to be preserved by appropriate application of the fair use defense . . . ."); Issacs, *supra* note 35, at 396 ("If litigation attorneys could be held liable for copyright infringement, the benefits associated with widely disseminated litigation documents would cease and there would be a substantial loss to public welfare resulting from the higher costs of legal representation."). To be sure, the democratic values argument would lose force in the face of "bad faith" plagiarism where one advocate persistently plagiarized from another while competing directly with the original drafter for clients in a discrete legal field. *See* Issacs, *supra* note 35, at 392 (reviewing copyright infringements claims being asserted among national class action firms where one firm was plagiarizing the "narrative" complaints of the other while competing for class counsel status).

97. Ralph Clifford captures this notion by suggesting a fifth "fair use" factor that focuses on "legal system considerations" where disallowing copying would be an impediment to the development of the common law. *See* Clifford, *supra* note 91, at 39–48; *cf.* Carey v. Kearsley (1802) 179 Eng. Rep. 679, 680 (K.B.) ("[W]hile I shall think myself bound to secure every man in the enjoyment of his copy-right, one must not put manacles upon science.").

competently advocate for one's client is all the incentive an attorney needs to produce quality work.[98]

3. Secondary Sources

The attorney that copies a secondary source into a brief presents a better case for actionable copyright infringement.[99] There is no reasonable argument that treatises and law review articles should be within the public domain because of a *quid pro quo* involving public funding. And, arguably the democratic and professional values arguing for fair use are muted with regard to copying from secondary sources. Still, "fair use" also insulates from sanction "minor" copying that falls short of a wholesale copying.[100] The usual sort of plagiarism from secondary sources—copying a few paragraphs here and there—would be minor enough to qualify as fair use.[101] Nonetheless, the "copyright theory of plagiarism" does provide a basis for sanctioning the more outrageous cases where an advocate has plagiarized pages upon pages from a secondary source.

This is, of course, the exact nature of Peter Cannon's plagiarism; recall that he plagiarized seventeen pages of a nineteen-page brief from an online article. And perhaps that answers the question at the top of this Article: Peter Cannon's plagiarism warranted a sanction because its predicate act—the copying—went beyond fair use and intruded on the copyright of the authors of the online article.[102]

But I'm still unconvinced that protecting the copyright interests of secondary source authors offers a reasonable justification for a rule against plagiarism in a brief. Copyright interests are, at their heart, economic interests, and even in extreme cases, tracking economic harm is near impossible when an attorney files a brief that plagiarizes a secondary source. What economic harm, for instance, was suffered by the authors of the online article that Peter Cannon plagiarized a single time in a brief filed with the Iowa Bankruptcy Court? By relying on copyright law to sanction an attorney for copying a secondary source, the court is purporting to vindicate what is surely an illusory economic interest. Thus, even in the rare circumstances where

98. *See generally* Issacs, *supra* note 35, at 435 ("[P]ermitting unauthorized use of an attorney's work would not likely thwart copyright's goal of encouraging authors to create works that would otherwise not be created without the incentive of temporary market exclusivity.").

99. Field, *supra* note 80, at 128 (2008) (noting that copyright protection for "law reviews, commercial treatises" is "unlikely to be disputed").

100. *See* Clifford, *supra* note 91, at 37.

101. *See id.*

102. Iowa Supreme Court Att'y Disciplinary Bd. v. Cannon, 789 N.W.2d 756, 758 (Iowa 2010). The *Cannon* matter also illustrates how a copyright theory of plagiarism would insulate from sanction more modest plagiarism. In *Cannon*, there were actually two acts of plagiarism examined by the Iowa Supreme Court. In addition to the sixteen pages plagiarized in his opening brief, Cannon also filed a second brief with the Bankruptcy Court. *Id.* In this second brief, while Cannon wrote most of the text, he copied verbatim long string cites from the article he had previously plagiarized. *Id.* The Iowa Supreme Court concluded that the copying of the string cites was not the sort of plagiarism that warranted a sanction. *Id.* That conclusion echoes fair use principles: the copying was too minor to sustain an infringement action.

plagiarism might offend a cognizable copyright interest, I just do not see how it could ever be worth the court's bother.

B. Attribution

In any event, an advocate, judge, or commentator discovering their work plagiarized into a brief is likely to be less concerned about the copying than the fact that they were not given credit for their work. Again, it is the lack of attribution, not the underlying copying, that lies at the heart of the plagiarism offense.

An original author's interest in attribution is captured by the so-called "moral rights theory" of copyright.[103] The moral rights theory recognizes that the author who finds her work plagiarized suffers something more than an economic harm; rather, the offense is more personal and dignitary.[104] Moral rights flow from the notion that when an author creates, the written product reflects the author's self in a meaningful way.[105] Copying a writer's work without providing attribution, then, exacts an emotional harm that transcends the marketplace. In *Stolen Words*, Thomas Mallon described the author's interest in attribution this way:

> Think how often, after all, a writer's books are called his or her children. To see the writer's words kidnapped, to find them imprisoned, like changelings, on someone else's permanent page is to become vicariously absorbed by violation.
>
> . . .
>
> From the lyric poem to the scientific footnote, the printed word is the writer's means of proving and perpetuating his existence. The identity of self and work, and the prospect of continuation, are more precious to him the promiscuous coin of the realm.[106]

I find this all a bit overwrought when applied to legal writing. But I recognize that there can be a creative aspect of drafting an original opinion, brief, or commentary such that the end product can begin to feel like an expression of oneself into the world. Spend enough time drafting something and you do feel you

---

103. The reference to moral rights translates from the French phrase *le droit moral*. "The adjective 'moral' has no precise English equivalent, although 'spiritual', 'non-economic' and 'personal' convey something of the intended meaning." SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986 456 (1987).

104. *See* Kwall, *supra* note 79, at 1997 ("Moral rights are aimed at preserving an author's dignity, honor, and autonomy."); Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1180 (2005) ("Society has expressed an entirely independent, somewhat *sui generis* interest in demarcating and ascertaining authorship, unrelated to any instrumental and utilitarian effects that authorial attribution may have on markets and productions. In other words, a correct authorial attribution is a thing of value in itself.").

105. *See* Kwall, *supra* note 79, at 1972 ("Central to moral rights is the idea of respect for the author's meaning and message as embodied in a tangible commodity because the author's meaning and message reflect his intrinsic creative process.").

106. MALLON, *supra* note 36, at xiii–xiv, 237. *See* LINDEY, *supra* note 77, at 231 ("The theft of a product of the mind is more than a legal wrong. It is a moral wrong as well.").

have spun a bit of yourself into the writing. Isn't there something, then, to a "protection of moral rights" theory of plagiarism?

First off, let's not get carried away with the notion that modern legal writers deeply intertwine themselves into their written work.[107] As composition theorists have long argued, modern plagiarism norms already reflect an antiquated "romantic" model of an autonomous and original author toiling away day upon day alone in a room.[108] However, since the 1600's, when modern notions of the plagiarism offense rooted,[109] production of the written word has changed dramatically—think the Guttenberg Press vs. Google Docs or Dropbox. The meaning of authorship has changed with it; composition in nearly every realm has become more social and collaborative.[110] With modern authorship such a fluid concept, a plagiarism rule premised on texts being an expression of an individual's existence in the world loses grip.[111]

This could not be truer than in modern legal practice, where multiple attorneys routinely contribute to a single document. Consider when an attorney plagiarizes a judicial opinion. Whose "self" did the plagiarist offend when he failed to give attribution? The clerk or clerks that did the original drafting? The judge who made changes, however material, and then endorsed the opinion with her signature? The persistent collaboration of most legal writing makes enforcement of a moral rights theory of plagiarism a fool's errand.[112]

---

107. *Cf.* Issacs, *supra* note 35, at 432 (rejecting notion that litigation materials have some sort of "inherent artistic purpose").

108. *See* ANDREA LUNSFORD & LISA EDE, SINGULAR TEXTS/PLURAL AUTHORS: PERSPECTIVES ON COLLABORATIVE WRITING 5 (1990) (describing "the pervasive commonsense assumption that writing is inherently and necessarily a solitary, individual act."); Tushnet, *supra* note 43, at 805–06 (observing that the "implicit model" of a "single artist whose name deserves to be the only name attached" to a single work often "depends on the erasure of key figures . . . who shaped the works.").

109. *See* LUNSFORD & EDE, *supra* note 108, at 78–79 (observing the Renaissance as a "critical period of transition" in modern authorship because of both the development of printing and a growing "artistic self-consciousness"); Rebecca Moore Howard, *Plagiarisms, Authorships, and the Academic Death Penalty*, in 57 COLLEGE ENGLISH 788, 790–91 (1995) ("The individual author defines the post-Gutenberg playing field, and that author is credited with the attributes of proprietorship, autonomy, originality and morality."); MALLON, *supra* note 36, at 4–6 (reviewing that historical practices recognizing "necessity of imitation" began to yield in 1600's to "competitive and personal" notions of authorship that emphasized originality).

110. *See* HOWARD, *supra* note 36, at 127 ("[T]he technological innovation of the computer is precipitating and accompanying shifts in textual values . . . the computer is 'dissolving the boundaries essential to the survival of our modern fiction of the author as the sole creator of unique, original works.'").

111. *See generally id.* at 133 (describing the literary theory that "the cumulative, interactive nature of writing [] makes impossible the representation of a stable category of authorship and hence a stable category of its cohort, plagiarism.").

112. *See* LUNSFORD & EDE, *supra* note 108, at 85 ("For if texts express an author's individual genius, how can a single text manifest the essential being of more than one person?"); *see also* Tushnet, *supra* note 43, at 809 (observing that "[t]he more cooks adding ingredients to the recipe, the more difficult it is to identify responsibility for the final result"). Notably, it is because of the challenge of unraveling "authorship" that courts have persistently rejected grafting an independent right of

Even if an attorney truly drafts alone, any claims to "originality" in legal writing remain highly suspect. The genius of the common law, of course, is that, to be sound, the analysis of any legal issue must be deeply informed by legal principles presented in earlier texts; i.e., written opinions. In this sense, then, an expectation of plagiarism is baked into the common law system. The work of any competent legal writer will, then, necessarily hew to the structure, grammar, and phrasing of earlier authors; i.e., the judges and their clerks that wrote the opinions upon which the legal writer relies (and whose writing, in turn, was surely informed by even more writers). Against this backdrop, it is a bit too much for any lawyer to claim that it is *his* children that are kidnapped when another lawyer plagiarizes.[113]

CONCLUSION

In the end, the prevailing rule against plagiarism in written practice cannot be justified. Competent plagiarism does not undermine the work of the courts. Plagiarism does not undermine the client's interests; if anything, it obtains cost-efficiencies on the client's behalf. Finally, original authors have only the barest copyright interests that might be offended by a plagiarized brief, and the legitimacy of claims to a "moral" right to attribution fade deeply in modern legal practice. Collectively, the interests served by a rule against plagiarism simply prove too inconsequential to outweigh the efficiencies obtained by the practice.

I recognize that an argument against an anti-plagiarism rule is an argument in favor of plagiarism. This is not a position I am particularly comfortable with. I am sympathetic to the notion that drafting a strong and persuasive argument is a work of creative art—it requires a linear logic elegantly woven through a narrative structure and a fluency of prose. Thus, I am deeply skeptical of the plagiarizing

---

attribution into American copyright law. This is not to say that courts and state bars cannot enforce an anti-plagiarism rule to serve legitimate extra-legal professional values. But copyright law's wisdom does offer counsel. American copyright law's rejection of an independent right of attribution is not some accidental doctrine. An enforceable right of attribution is incorporated into the Berne Convention for the Protection of Literary and Artistic Works, the premier international agreement governing intellectual property rights. *See* Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 67-69 (2006). But the United States, despite being a signatory to the Berne Convention, has persistently rejected recognizing attribution rights. *See* Tushnet, *supra* note 43, at 787 (reviewing omission of right of attribution in United States law). As David Nimmer explains, the enforcement challenges presented by the fluid nature of modern authorship would render an attribution regime "a cure worse than the disease." Nimmer, *supra* note 30, at 65; *see also* Tushnet, *supra* note 43, at 814 (concluding the administrative costs of affording attribution right under copyright law would outweigh the benefit to authors).

113. *See* N.C. State Bar, Formal Ethics Op. 14 (2009) ("By its nature, the application of the common law is all about precedent, which invites the re-use of arguments that have previously been successful and have been upheld. It would be virtually impossible to determine the origin of the legal arguments in many briefs."); Nimmer, *supra* note 30, at 62 (suggesting that plagiarism "form[s] the backbone of litigation in the federal courts."). The diffusion of authorship fostered by the common law is only exacerbated by modern practice which gives writers access vast searchable databases of other authors' writings. *See generally* HOWARD, supra note 36, at 131–32 ("[E]lectronic composition is changing authorship by providing new models of and venues for collaboration and mimesis.").

attorney—for copying another's creative expression and taking credit for the work, but also for failing to pursue the craft "the right way." Still, I am convinced that many Americans in need of legal representation simply cannot afford to subsidize an attorney's original brief-writing. If plagiarism allows attorneys to provide cost-effective legal services to these under-resourced Americans, then courts and professional tribunals should have no objection.